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ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-749

FAIRDALE FARMS, INC.,

Petitioner,

-vs.-

YANKEE MILK, INC. and REGIONAL COOPERATIVE MARKETING AGENCY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Capper-Volstead Act and Section 6 of the Clayton Act give farmers the right to seek, maintain and exercise monopoly power through the formation, growth and combination of agricultural cooperatives, in the absence of anticompetitive conduct.

2. Whether the setting of price for raw milk by an agricultural cooperative association or marketing agency in common, all of whose members are agricultural cooperatives, without more, is a marketing function protected under the Capper-Volstead Act and Section 6 of the Clayton Act.

3. Whether an association of dairy farmers, or a marketing agency in common composed of dairy farmer associations, acting pursuant to the authority of section 1 of the Capper-Volstead Act and section 6 of the Clayton Act, engages in anticompetitive conduct in violation of section 2 of the Sherman Act when it refuses to exempt a buyer of milk from application of a legally established overorder price charged with respect to all Class I milk priced under a particular governmental milk marketing order where other buyers have not been granted a similar exemption for such milk purchased by them priced under that milk order?

4. Whether the refusal of an association of dairy farmers, or a marketing agency in common composed of such associations, to agree to a demand by a buyer of milk that the buyer be granted special services without charge and a right to 45 days' advance notice of any termination of deliveries constitutes anticompetitive conduct in violation of section 2 of the Sherman Act, where (1) the buyer at the time of such demand refuses to pay the legally established overorder price for milk delivered in past months and gives no assurance of paying the overorder price with respect to future deliveries subject to it, (2) such services without charge and such notice are not granted to other buyers, (3) the buyer's demand contains no assurance that the milk to be delivered will be paid for, (4) the timing of the demand and the response required by it are on their face unreasonable, and (5) the buyer itself terminates the parties' business relationship on one week's notice.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iii

Counterstatement of the Case 2

Argument - Introduction 3

I. The Court of Appeals Correctly Ruled That the Capper-Volstead Act Permits Agricultural Products and Their Associations and Marketing Agencies to Combine To Market Their Products Collectively and, in Doing So, To Seek and Exercise Monopoly Power, So Long as They Do Not Engage in Anticompetitive Conduct. Its Decision is Entirely Consistent With Prior Decisions Of This Court 4

II. The Capper-Volstead Act Authorizes Price-Setting By Farmers, Their Associations and Common Marketing Agencies of Their Associations 7

Conclusion 9

TABLE OF AUTHORITIES

Pages

CASES

Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2108, 2110 (1983) .6

Case Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967) .6

Kinnett Dairies, Inc. v. Dairymen, Inc., 512 F. Supp. 608 (M.D. Ga. 1981), *aff'd*, 715 F.2d 520 (11th Cir. 1983) .6

Maryland and Virginia Milk Producers Ass'n v. United States, 362 U.S. 458 (1960) .4,5,7

National Broiler Marketing Ass'n v. United States, 436 U.S. 816 (1978) .4,6

Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative, 413 F. Supp. 984 (N.D. Cal. 1976), *aff'd.*, 580 F.2d 369 (9th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1090 (1979) .8

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962) .4,5,8

Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974) .8

United States v. Borden Co., 308 U.S. 188 (1939) .4,5

Table of Authorities Continued:

United States v. Dairymen, Inc., 660 F.2d 192 (6th Cir. 1981) 6

United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956) 7

United States v. Grinnell Corp., 384 U.S. 563 (1966) 5

ADMINISTRATIVE DECISIONS

Central California Lettuce Producers Cooperative, [1977] Trade Reg. Rep. (CCH) ¶ 21,337 (FTC) 8

STATUTES

Capper-Volstead Act, § § 1, 2, 7 U.S.C. § § 291, 292 (1970) 3,4,5,6,7,8,9

Sherman Antitrust Act, § 2, 15 U.S.C. S 2 (1970) 4

TREATISES, REPORTS and MISCELLANEOUS

P. Areeda & D. Turner, Antitrust Law (1977 & Supp. 1982) 6

Hearings on S. 4344 Before the Senate Committee on the Judiciary, 66th Cong., 2nd Sess. 8

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Yankee Milk, Inc., and Regional Cooperative Marketing Agency, Inc. respectfully request that this Court deny the Petition of Fairdale Farms, Inc. for review of the opinion of the United States Court of Appeals for the Second Circuit entered August 8, 1983.

PARTIES

The parties are Plaintiff Fairdale Farms, Inc. ("Fairdale") and Defendants Yankee Milk, Inc. ("Yankee") and Regional Cooperative Marketing Agency, Inc. ("RCMA"). Yankee has no parent company, no subsidiaries and no affiliates. RCMA has no parent company and no subsidiaries.[1]

COUNTERSTATEMENT OF THE CASE

The pending petition is the second submitted by Petitioners in this case. The previous petition was denied by the Court on October 15, 1981. 454 U.S. 818. There Petitioner raised essentially the same questions as Questions 1 and 2 of the present petition.

Because the opinions of the lower courts in this case succinctly summarize the relevant facts and proceedings in this case in a manner sufficient to permit appropriate disposition of the issues presented by the Petitioner, Yankee and RCMA will not attempt a detailed Counterstatement of the Case.

Briefly, the Defendant milk producer organizations exercised the rights granted to them in the Capper-Volstead Act to combine and set prices for their milk. This action was taken in response to a severe cost-price squeeze which affected New England dairymen in the mid-1970's and was deemed necessary by Defendants to secure prices above federally established milk order prices with which their members could live.[2] The prices so set reflected market conditions in the various markets in which their milk was sold.

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1 RCMA is a marketing agency in common whose members are Agri-Mark, Inc., Richmond Cooperative Creamery, Cabot Dairy Farmers Cooperative, Niagara County Milk Producers, Upstate Cooperative, Inc., Dairylea Cooperative and Northeast Dairy Cooperative Federation.

2 "The United States government through the market order system does not purport to establish fair or reasonable prices — only minimum prices. The Department of Agriculture encourages producers through their cooperative organizations to bargain for fair and reasonable prices above the established minimum prices." *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 606, 634 (M.D. Ga. 1981).

Fairdale refused to pay the price established by Yankee and RCMA. When Yankee insisted that the price should be paid, Fairdale continued to refuse to pay its outstanding obligations and demanded special terms of sale not granted to any other handler by Yankee and RCMA. Fairdale's demands were stated in a letter delivered to Yankee on December 24, 1974. This ultimatum required a favorable response by noon on December 26, failing which Fairdale announced that it would sever the parties' business relationship on December 31, 1974. When Yankee responded that it could not agree to Fairdale's demands, Fairdale refused to accept Yankee producer deliveries after December 31, 1974. As the Court of Appeals stated, "it was not Yankee, but Fairdale, which terminated their business relationship, and it did so on one's week's notice." (Pet. App. 72a).

ARGUMENT

Introduction

The Petition now before this Court raises essentially the same issues raised by Fairdale in its prior petition in this case. Fairdale's efforts to relitigate these issues should be denied. There have been no subsequent developments in the law since certiorari was denied sugguesting that the prior *Fairdale* decision was incorrect. In fact, the Sixth, Eighth and Eleventh Circuit courts have agreed with the Second Circuit Court of Appeals' analysis of the applicable law.

Fairdale makes two agruments in support of its contention that certiorari should be granted. It contends that the Court of Appeals has decided important questions of federal law which have not been, but should be, decided by this Court, and further, that the Court of Appeals' decision conflicts with prior decisions of this Court interpreting the Capper-Volstead Act.

Yankee and RCMA respectfully submit that the construction and application of the Capper-Volstead act set forth in the Court of Appeals' opinions below are so clearly correct that review by this court is not called for. They further submit that the questions presented for review are settled law and need not be reviewed by this Court because the opinion of the Second Circuit below:

1. Does not conflict with any decision of this Court and is entirely consistent with the leading cases decided by this Court construing the Capper-Volstead Act, including *United States v. Borden Co.*, 308 U.S. 190 (1939); *Maryland and Virginia Milk Producers Ass'n. v. United States*, 362 U.S. 458 (1960); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) and *National Broiler Marketing Ass'n. v. United States*, 436 U.S. 816 (1978).

2. Does not conflict with the decision of any other circuit, and, in fact, fully accords with a wide range of lower court precedent. The lower court's opinion is fully harmonious with decisions of the Ninth Circuit and the Federal Trade Commission which recognize the right of cooperatives and associations such as RCMA to establish prices for agricultural products without more, and with decisions of the Sixth, Eighth and Eleventh Circuit Courts allowing agricultural cooperatives and common marketing agencies to seek and attain monopoly power through the formation, growth and combination of cooperative organizations so long as such organizations do not engage in anticompetitive conduct.

I.

THE COURT OF APPEALS CORRECTLY RULED THAT THE CAPPER-VOLSTEAD ACT PERMITS AGRICULTURAL PRODUCERS AND THEIR ASSOCIATIONS AND MARKETING AGENCIES TO COMBINE TO MARKET THEIR PRODUCTS COLLECTIVELY AND, IN DOING SO, TO SEEK AND EXERCISE MONOPOLY POWER, SO LONG AS THEY DO NOT ENGAGE IN ANTICOMPETITIVE CONDUCT. ITS DECISION IS ENTIRELY CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

In its first opinion, the Court of Appeals examined in considerable detail the relationship between the Capper-Volstead Act and Section 2 of the Sherman Act. Its careful review focused on the

language of Capper-Volstead,[3] its legislative history, the long background of congressional support for the cooperative movement and the course of court and Federal Trade commission construction of the Act. The court's opinion persuasively demonstrated that Congress intended to allow farmers to acquire, maintain and exercise monopoly power through the formation, growth and combination of agricultural cooperatives.

As the Court of Appeals below observed (Pet. App. 52a), this Court has spoken regarding the first question raised by the Petitioner in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 24 (1962), where the Court noted with apparent approval that portion of a district court's charge which stated that cooperatives could lawfully have a monopoly of the products in which they dealt, and in *Maryland and Virginia Milk Producers Ass'n. v. United States*, 262 U.S. 458, 465 (1960), where this Court stated that farmers could act together in cooperative associations without the associations as such being illegal under the antitrust laws, "as they might otherwise have been."

Nothing in the history of the Act and its subsequent construction supports Fairdale's position that the Capper-Volstead Act does not protect combination of producers of associations involving the achievement and exercise of monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), upon which Fairdale places principal reliance, does not address, or even touch upon, the scope of the Capper-Volstead exemption. Fairdale completely misses the point of *United States v. Borden Co.*, 308 U.S. 190 (1939), i.e., that, while farmer and association combination is permitted, their combination in restraint of trade with nonfarmers, who are not protected by Capper-Volstead, is barred.

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3 It should be noted that the Petition, at pp. 3-5, omits in its list of relevant statutory materials Section 2 of the Capper-Volstead Act, 7 U.S.C. § 292, a provision quoted and relied upon in significant part by the Court of Appeals in construing the Act. See Pet. App. 44a, 67a-68a. "It may be, as Appellant contends, that market forces will not correct overpricing in the cooperative milk trade as rapidly as they might in others. Congress wisely has protected against this possibility, however, by authorizing the Secretary of Agriculture [in Section 2 of the Capper-Volstead Act] to issue a cease and desist order against any monopolization by a cooperative which has 'unduly enhanced' the price of any agricultural product. 7 U.S.C. § 292." (Pet. App. 67a-68a).

Fairdale ignores the central thrust of the other two Capper-Volstead cases it cites, *Case Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967) and *National Broiler Marketing Ass'n. v. United States*, 436 U.S. 816 (1978). Both cases recognize that Capper-Volstead constitutes a very significant exemption from the operation of the Sherman and Clayton Acts, and, consequently, carefully restrict the availability of its benefits to those parties clearly intended by Congress to be protected by the Act, i.e., farmers and their associations and marketing agencies in common. Unlike those cases, there is here no question but that the acts of formation and combination challenged were carried out exclusively by farmers and their organizations.

Since the Court of Appeals' first opinion in this case was issued in 1980, (1) its analysis of the operation of the Capper-Volstead Act has been concurred in by the U.S. Department of Justice in its *amicus curiae* brief filed in June of 1981 in response to the request of this Court during its consideration of the present Petitioner's petition in the prior certiorari proceedings (See Brief of The United States as *amicus curiae* in No. 80-1523, October Term, 1980); (2) this Court has denied certiorari in this case with respect to essentially the same questions as the first and second questions presented in Petitioner's pending petition; and (3) the Sixth, Eighth and Eleventh Circuit Courts of Appeals have followed the Second Circuit Court's analysis of the Capper-Volstead Act.[4] In the face of this unanimous precedent, Fairdale again asks this court to review what has become settled law.

Petitioners at page 18 of the Petition, quote from Areeda and Turner, **Antitrust Law** for the proposition that there is need for definitive rulings concerning the potential scope of cooperative market power. In fact, in their 1982 Supplement to that text, Areeda and Turner examine this question in some detail and twice cite the Court of Appeals' first *Fairdale* opinion approvingly as an authoritative statement of the law. P. Areeda and D. Turner, **Antitrust Law**, 76 (Supp. 1982).

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4 *See United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1182-83 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 2108, 2210 (1983) and *Kinnett Dairies, Inc. v. Dairymen, Inc.*, 715 F.2d 520 (11th Cir. 1983) (per curiam), *aff'g*, 512 F.Supp. 608, 630-32 (M.D. Ga. 1981).

This Court has expressly recognized that the Capper-Volstead Act is an "exception to the generality of monopoly prohibitions." *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 389 n. 14 (1956). The construction of the Capper-Volstead Act urged by Fairdale contradicts this generally understood purpose of the legislation. The Court of Appeals was correct in rejecting Fairdale's arguments and holding that Capper-Volstead permits the acquisition and exercise the monopoly power by farmers and their cooperatives through the formation, growth and combination of those associations and their common marketing agencies.

The District Court and the Court of Appeals recognized that a cooperative organization is not sheltered from the operation of the antitrust laws to the extent that it engages in competition "somthering" (Pet. App. 61a) conduct, "competition-stifling practices" (Pet. App. 68a, *citing Maryland and Virginia Milk Producers Ass'n. v. United States, supra*), and predatory activities. Their careful analysis of the application of the anticompetitive conduct standard to the relevant facts of this case, which appears in Petitioner's Appendix at pp. 57a-73a, is entirely consistent with the position of the United States in its *amicus curiae* brief filed at the Court's request in the prior certiorari proceedings, and clearly disposes of any notion that Defendants engaged in any activity giving rise to antitrust liability. There is, quite simply, no basis for the claim that there is need for examination by this Court of the lower courts' application of the anticompetitive conduct standard to the facts of this case.

II.

THE CAPPER-VOLSTEAD ACT AUTHORIZES PRICE-SETTING BY FARMERS, THEIR ASSOCIATIONS AND COMMON MARKETING AGENCIES OF THEIR ASSOCIATIONS.

Fairdale asserts that a cooperative association or a common marketing agency, all of whose member cooperatives are qualified

Capper-Volstead associations, organized for the sole purpose of establishing prices for the produce of such members is not entitled to Capper-Volstead protection.[5]

Fairdale's argument has been the subject of litigation in a number of federal forums, including two district courts, two courts of appeals and the Federal Trade Commission, and has in each such case been rejected, without dissent, following careful consideration on the basis of the relevant statutory language, the legislative history of that language and common sense. See *Treasure Valley Potato Bargaining Ass'n. Ore-Ida Foods, Inc.*, 497 F.2d 203, 213-217 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974); *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F. Supp. 984, 992 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1090 (1979); *Central California Lettuce Producers Cooperative*, [1977] Trade Reg. Rep. (CCH) ¶ 21,337 (FTC), and the decisions below. Further, this Court has ruled that combinations between associations of farmers are protected. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra*, 370 U.S. at 29 (1962).

These decisions establish beyond cavil that the setting of prices by an agricultural cooperative association or marketing agency in common, all of whose members are agricultural cooperatives, without more, is a marketing function protected under the Capper-Volstead Act and Section 6 of the Clayton Act.[6]

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5 It should be noted that the parties are in dispute as to the actual extent of RCMA's marketing functions. See the District Court's opinion, at Pet. App. pp. 4a-5a, detailing RCMA functions in addition to price-setting.

6 Petitioner's contention (at Pet., p. 19) that the "legislative history also suggests that price fixing [between independent associations] was not authorized by the Act" is a striking instance of its cavalier approach to analysis of the Capper-Volstead Act. The quotation set out in footnote 10 of the Petition refers to an early version of the Capper-Volstead Act which did not include provision for marketing agencies in common like RCMA. The Act as adopted does, of course, make such provision, this change only underscoring the correctness of the decision below. See Hearings on S. 4344, Before the Senate Committee on the Judiciary, 66th Cong., 2nd Sess., at 5:

CONCLUSION

Acceptance of the novel theories advanced by Fairdale in its Petition would contravene the plain language of the Capper-Volstead Act and Section 6 of the Clayton Act and the prior opinions of this Court, and would destroy the fundamental assumptions upon which farmers themselves have based nearly 60 years of cooperative organization and growth. Respondents respectfully submit that the petition should be denied in all respects.

Respectfully submitted,

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